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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JEROME LOME MAUA, Defendant and Appellant.	A151286 (San Francisco County Super. Ct. No. SCN223329)

Following a jury trial, defendant was convicted of twelve crimes arising out of three domestic violence incidents involving his spouse. Defendant appeals, making three arguments: (1) the trial court erred in allowing some evidence of prior domestic violence in the prosecution's case-in-chief; (2) Evidence Code section 1109 is unconstitutional; and (3) CALCRIM No. 852, in the form given by the trial court, was an improper argumentative instruction. We conclude that none of these contentions has merit, and we affirm.

BACKGROUND

The Facts

The General Setting

Defendant Jerome Maua was born in American Samoa, and lived there until 1993 when, at age 15, he came to the United States to live with his mother in San Francisco. He is a former high school football linebacker, 6'2" or 6'3" tall, described as weighing 276 pounds at the time of the incidents here.

In 2009, defendant met N.S. in a dance hall, and they were married in August 2010. N.S. had two children at the time, a son aged 12 and a daughter nine. And the four of them—N.S., her children, and defendant—first lived in Santa Rosa.

Domestic Violence Before the Charged Incidents

The first time defendant was violent with N.S. was within three months of their marriage, on Thanksgiving, 2010. According to N.S., they got into an argument when defendant wanted to drive, and she tried to stop him because he had been drinking. And then it "got physical": he slapped N.S., giving her a black eye. N.S.'s son told defendant to stop hitting his mom, and defendant then hit him. Later, defendant called and apologized to N.S. and her son, and the couple reconciled, reconciliation that would repeat many times.[1]

The next incident occurred on February 10, 2013, when defendant and N.S. went to a club, where defendant became angry with N.S. for being too "flirty." They argued on the drive home, which argument turned physical when they arrived home, as N.S. described in detail: defendant pushed and strangled her, punched her in the face, "stomped" on her foot, bit her, and dragged her along the ground, causing abrasions. Defendant then left. After he left, N.S. put her hand on the couch to lift herself up, and

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[1] Defendant's brief contains what it refers to as the "Statement of Evidence Presented," which defendant sets forth at great length, for over 31 pages, much of which includes his version of the evidence. The apparent reason for doing so is to attempt to support the theme of his defense at trial, a theme set out in defendant's "Introduction and Summary of Argument," which is this: The "evidence at trial depicted a stormy, drug-fueled and violent relationship between Jerome and his then-wife, [N.S.], with the violence being mutual. Jerome testified that one of the incidents was simply an accident that occurred while they were engaged in rough play. He explained that as to the others they were a hybrid of accident/self-defense as he was defending himself against her attacks or trying to remove her from the house."

While defendant devotes many pages of his brief to his version of the incidents of violence, his version of events was necessarily rejected by the jury. And so we set forth the facts in accordance with the settled principle applicable even in substantial evidence review cases—which this is not—that we review the record in the light most favorable to the judgment and presume in support of it the existence of every fact the jury could reasonably have deduced from the evidence. (*People v. Jennings* (2010) 50 Cal.4th 616, 638–639; *People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

noticed her nose was bleeding and there was blood on the floor and couch. She got into the shower and cleaned up. Meanwhile, defendant's brother Dominic, who was there at the time, called the police.

Santa Rosa Police Officer Jessie Ludikhuize responded to a 911 "hang up" call at the home, and when he arrived, he heard the sound of a running shower and a woman crying. Ludikhuize knocked on the door and some five minutes later, N.S. opened the door, wet, crying, and distraught. She had a black eye, bruising around her neck, and a bite mark on her right arm. She was walking with a limp, her legs were bruised, and her right foot was swollen and bruised.

N.S. let Ludikhuize in and went to put on some clothes. While waiting for her, Ludikhuize noticed blood on the living room floor, a sweater with blood on it, and a sharp kitchen knife on the floor.

N.S. returned, still upset, blood still trickling from her nose so that she had to wipe it periodically. And, crying throughout, N.S. told Ludikhuize that she was married to defendant; that they had been in an ongoing argument for the last two days during which time he had been repeatedly punching her; that all of her bruises were from that; and that defendant had caused all of her injuries.

Ludikhuize called an ambulance, and N.S. was transported to the hospital where she was treated by Dr. Ridgely Muller. And where her injuries were documented: She had a bruised eye, bruising and swelling to her nose and lip, a nasal bone fracture, scratches on her neck and collar bone, bruising on her knees and legs, a possible bite mark on her arm, and a sprained foot. She also had back pain consistent with being shaken, grabbed, or thrown, and had difficulty walking for a week or two.

Ludikhuize located defendant in the parking lot of a Safeway a few miles from the home, and arrested him, N.S.'s blood on his face.

Defendant was in custody for about two weeks, and then came home, in violation of a restraining order that had been imposed against him. N.S. "didn't know what to do," but she let him back in because he was her husband and she thought maybe things would

change. They were supposed to go to counseling together, but did not. Defendant did go to a "batter enrichment program," and things got better for a while.

Not long after this, N.S.'s two children went to live with their father. N.S. and defendant lost their home, and for a while, she stayed with her mother. Defendant left with his brother Dominic, and N.S. did not hear from him for a few days, then learned that he had moved to San Francisco. He told her she would have to come there if she wanted to be with him. And N.S. went to San Francisco, moving into defendant's mother's house, where defendant's mother, his sister, his sister's partner, and two young children also lived.

The First Charged Incident: January 13, 2014

On January 13, 2014, defendant, N.S. and some of defendant's friends went to a sports bar, where they drank and socialized for several hours, returning home in the early evening. N.S. went to bed, and defendant went out again. When defendant returned, N.S. asked where he had been, accusing him of being unfaithful, and they began to argue. N.S. went into the bathroom, came out, and said she was leaving. Defendant said "No, you're not," and stood in the doorway. N.S. tried to push past him, at which point he picked her up and threw her some four feet, and she hit the wall and landed on the bed. N.S.'s legs were in an open position, and as she was lying there she felt a mirror "frame in between [her] legs . . . and then blood came out." Defendant had shoved a mirror, described by N.S. as oval shaped, 18" tall, and a foot wide, between her legs. N.S. screamed, and her leggings and jeans became saturated with blood. Defendant's mother came into the room, picked up broken glass from the mirror, and told N.S. to take a shower to clean herself up. Meanwhile, defendant had run off.

After some 18 hours, the bleeding had not stopped, so N.S. went to the hospital. She was embarrassed and did not tell the medical professionals how she was injured. N.S. was at the hospital for a long time and believed that medical staff kept her there to try and learn how she was injured because "[t]hey don't see this all the time." N.S. explained, "I came close to telling the doctor, but then I said, you know, I'm going to go back to him."

Nurse Brian Davis treated N.S. and remembered her and her injury because it was "definitely out of the norm . . . ." N.S. told him that she had been bleeding for a day, was sore, and wanted to be checked out. N.S. was soft spoken, would not make eye contact, and wanted to talk through what the examination process would entail in detail before she undressed. Davis described N.S. as "very, very, very anxious. Her heart rate was up, all of her vital signs were disproportionate to the complaint that she was giving me saying that it just hurt. . . . I thought something else is going on."

Davis discovered that N.S. had a "brutal, severe injury" to her vulva, labia, and vagina. She had a huge bruise on the right side of her vulva, which was tender, and her vaginal skin was red and blue, with blood seeping down her fourchette. There was a three- to four-inch laceration spanning from the labia minora to the vaginal wall, which Davis described as a linear wound, meaning that something sharp made contact with N.S.'s skin using a lot of force. N.S.'s labia was partially severed, and the tissue had necrotized. N.S. had a labiaplasty and episiotomy, and her labia was permanently disfigured.

After the hospital released N.S., she called defendant and asked him to pick her up. Defendant asked N.S. how she got to the hospital, and she said she traveled there by bus. He told her, "[T]ake the fucking bus back."[2]

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[2] Defendant's version of the January 13 incident includes that N.S. was angry at him when he returned home; accused him of having sex with someone; and threw a make-up box and then a telephone at him. Then, when defendant said he was leaving, N.S. said "you're not," and took the mirror off the wall, and then, according to defendant, what occurred was this: "[h]e grabbed the mirror and tried to take it away from her as he told her to stop. [Citation.] She pushed it toward him and tried to poke him with it, then she pulled it hard. [Citation.] [¶] [Defendant] let go, and she fell onto the couch. [Citation.] When she fell on the futon couch, he laughed at her and said, 'Ha-ha, that's what you get,' and then left. [Citation.] She was sitting on the couch, with one leg up and one leg down, with her foot on the floor. [Citation.] [Defendant] tried to open the door and she shoved the mirror with both hands at him. [Citation.] It pushed into his stomach and he jumped back. [Citation.] He pushed it back toward her with both hands. [Citation.] He did not remember how hard; he just opened the door and ran out. [Citation.]"

In February 2014, N.S. left defendant, returned to her mother's house in Santa Rosa, and filed for divorce. But by September 2014, they had reconciled. As defendant did not have a home, N.S. reached out to his sister and mother, and defendant's mother allowed N.S. and defendant to move into her home again, which they did in September. Though they were back living together, N.S. described defendant as "worse" and "angrier" than before, and went on to say that there was approximately one violent incident per week. N.S. generally described some of them, testifying about a couple of times he gave her black eyes, and another time when he locked her out of the house when she was wearing only a towel. Defendant also took all the cash had in the bank and took her phone away a few times when she was trying to leave, eventually keeping her phone. None of this was reported to authorities.

N.S. and defendant were "arguing pretty constantly." She described defendant as jealous, and he accused her of having sex with one of his friends. He was there all the time and would not let her leave. He would video inside the house with his phone and show her the video. But nothing would be going on, except her doing the dishes or going up the stairs, but defendant would point out a shadow or something as proof she was doing something with a friend of theirs—a friend who did not appear in the video.

The Second Charged Incident: November 11, 2014

One day in early November N.S. was on the floor, having been "forcefully" put there by defendant, and defendant kicked her in the jaw. All N.S. could remember is feeling hot, and then she blacked out. When she woke up, he was there, trying to help her get up. He was saying, "I'm sorry, I'm sorry." N.S. got up and ran upstairs to the bathroom. She saw that her face was swollen, and she could not move her mouth.[3]

[3] Defendant's version of this incident was that he and N.S. were using methamphetamine every day and drinking; that during one of those days, they were horsing around, and she came up behind him and tried to put her finger in his anus; that he was startled and reflexively jumped up and hit her in the eye with his hand. Defendant testified he did not kick her, but did accidentally give her a black eye, though he did not knock her unconscious.

The Third Charged Incident: November 13, 2014

For a week or so N.S. had been mostly sleeping on the couch, so that defendant could "keep an eye on" her. One evening, following a day of drinking (and probably having used methamphetamine), N.S. fell asleep on the couch. Awakened by a grab or a touch, she awoke to find defendant on top of her. As she tried to push him off with both hands, defendant bit her finger. N.S. screamed, and defendant pushed her out of the house, in the rain, where N.S. fell, and hit her head on something. She then got up and tried to go back inside, but the door was locked. N.S. then looked at her finger and saw that half of it was gone, and screamed, "Oh my God! He bit my finger off!"

A neighbor called the police. San Francisco Police Officer Nicholas Hillard responded, and found N.S. screaming and sitting on the concrete stairs in the rain, rocking back and forth while clutching her hands, pale and in shock. The top part of her left index finger was gone and there was blood everywhere. N.S. told Hillard that defendant accused her of cheating, hit her, dragged her to the front door, and threw her out; that she pounded on the front door, and defendant eventually let her back in; that defendant then grabbed her, threw her across the living room onto the couch, and started punching her. N.S. put her hands up to protect herself and felt a sharp pain to her left index finger. Defendant then threw her out of the house again, and N.S. saw that her left index finger tip was missing. N.S. had a bump on the back of her head, some bruising on her left palm, and abrasions on her right forearm. N.S.'s fingertip had been forcibly removed, with bone exposed and the nail bed gone, an injury consistent with a bite or a knife. The injury required surgery.[4]

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[4] Defendant's version of the incident is that he and N.S. argued, and she threw a can of paint at him, following which she began to break some plates and threw other things. Then he "walked over to her and she began to punch him in the chest and face. [Citation.] [¶] [Defendant] grabbed her with both arms, like in a hug, picked her up and carried her outside the house through the back door and put her down. [Citation.] While he was carrying her, she was pushing on his face. [Citation.] She did not fall, nor did he kick her or bite her. [Citation.] He had no idea she had lost the tip of her finger. [Citation.]"

After November 13, 2014, N.S. moved into a shelter. Defendant's sister called her at the shelter and told her, "[M]om wants you to come home." This made N.S. feel good, and she moved out of the shelter and back in with defendant's mother. And she started talking to defendant on the phone again, as she just "wanted everything to be okay." But she eventually moved out of defendant's mother's house, having realized "It's not my job to protect him anymore . . . I need to just walk away. This is not working." She no longer wanted to "go out of [her] way to make it okay for [defendant]."

The Proceedings Below

The Charges

By information filed February 14, 2017, defendant was charged with 13 separate felonies, based on the three separate incidents described above. Five of the charges were based on the January 13 incident: Count 1, mayhem (Pen. Code, § 203);[5] count 2, domestic violence with prior convictions (§ 273.5, subd. (f)(1)), with an allegation of great bodily injury (§ 12022.7, subd. (e)); count 3, assault with force likely to cause great bodily injury (§ 245, subd. (a)(4)), with an allegation of great bodily injury (§ 12022.7, subd. (e)); count 4, battery with serious bodily injury (§ 243, subd. (d)); and count 13, contempt of court regarding a stay away or protective order (§ 166, subd. (c)(1)).

Three of the charges were based on the November 11 incident: Count 5, domestic violence, with an alleged prior conviction (§ 273.5, subd. (f)(1)), with an allegation of great bodily injury (§ 12022.7, subd. (e)); count 6, assault with force likely to cause great bodily injury (§ 245, subd. (a)(4)), with an allegation of great bodily injury (§ 12022.7, subd. (e)); and count 7, battery with serious bodily injury (§ 243, subd. (d)), with an allegation of great bodily injury (§ 1192.7, subd. (c)(8)).

The remaining five charges were based on the November 13 incident: Count 8, aggravated mayhem (§ 205); count 9, sexual penetration by foreign object, force and violence (§ 289, subd. (a)(1)(A)), with allegations of great bodily injury (§§ 12022.8, 667.61, subds. (d)(6) & (d)(3)); count 10, domestic violence, with an alleged prior

[5] All undesignated statutory references are to the Penal Code.

conviction (§ 273.5, subd. (f)(1)) and an allegation of great bodily injury (§ 12022.7, subd.(e)); count 11, assault with a deadly weapon (not a firearm) (§ 245, subd.(a)(1)), with an allegation of great bodily injury (§ 12022.7, subd.(e)); and count 12, battery with serious bodily injury (§ 243, subd.(d)), with an allegation of great bodily injury (§ 1192.7, subd. (c)(8)).

The Trial

Trial began in late January 2017, with motions in limine, and testimony was taken for some five and a half days. Closing arguments began on February 14, and concluded the next day, at which time the jury began deliberations. The jury had one brief question, to which the court responded on the morning of February 16, and that afternoon the jury announced it had reached a verdict on all counts except count 1, as to which the court declared a mistrial. As to the remaining twelve counts, the jury found defendant guilty and the enhancements to be true on seven of the counts: 2, 3, 4, 10, 11, 12, and 13. The jury found defendant guilty on two other counts, counts 5 and 6, though finding the great bodily injury allegations to be not true. And defendant was found not guilty of the crimes charged in counts 7 (battery with serious bodily injury), 8 (aggravated mayhem), and 9 (forcible sexual penetration), but in each of the three counts was found guilty of the lesser offense of battery.

Sentencing occurred on April 28, at which the prosecutor dismissed count 1, following which defendant was sentenced to a term of 14 years in state prison. An order terminating the previously issued stay-away order was filed in open court and a new ten year stay-away order was signed. On May 2, defendant filed a notice of appeal.

DISCUSSION

The Evidence of Defendant's Prior Acts of Violence Was Properly Admitted

Defendant's first argument is that the trial court erred in admitting the evidence of prior domestic violence when it did, arguing the "error violated his rights to due process and if trial counsel's objections were in [*sic*] inadequate then [defendant] also received constitutionally insufficient counsel."

The argument is lengthy, referring, sometimes without record reference, to some pre-testimony motions, and then to various Evidence Code sections. And among other things, defendant says this: "Ultimately, the court permitted the prosecution to introduce in its case in chief the prior domestic violence convictions from 2001 and 2013 as propensity evidence under Evidence Code section 1109 and instructed the jury accordingly. [Citation.] However, during [N.S.]'s direct testimony, she was permitted to discuss a variety of prior incidents involving [defendant]. In fact, the very first thing the jury heard in the prosecution's case-in-chief was [N.S.] recounting prior domestic violence. [¶] She began with an incident in 2010 in which [defendant] allegedly struck both her and her then 12 year old son in the face on Thanksgiving. [Citation.]" And, defendant asserts on the next page, "Here, what is at issue is the court's conclusion of law that Evidence Code section 1103 permits introduction of character evidence in the prosecution's case in chief."

The argument is misplaced, and easily defeated by the record here: the evidence was admissible—and so ruled on by the trial court—under Evidence Code section 1109.

Evidence Code section 1109, subdivision (a)(1) provides that "Except as provided in subdivision (e) or (f), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352." And while defendant's counsel did not object to the evidence below—and thus no ruling was made at the time—it is apparent from the record it was under Evidence Code section 1109 that the evidence was allowed. Specifically:

The People filed a motion in limine concerning admissibility of defendant's prior conduct "pursuant to Evidence Code 1101(b), 1102, 1103, and 1109."
Defendant also filed several motions in limine, one of which sought to exclude "the below-mentioned evidence pursuant to Evidence Code Sections 350 and 352," in which some items of evidence were described as "potential 1109 evidence."

The motions in limine were argued at length below, for several pages in the transcript, culminating with this:

"THE COURT: I think the last brief is the brief on the 1101, 1102, 1103, and 1109. And we've gone through some of this with respect to the 1103.

"So can you just specify on your very helpful chart which are you planning to try to introduce?[6]

"MR. MAINS [the prosecutor]: Okay. So with regard to the first one the 2013 domestic violence incident, I am seeking to introduce that.

"THE COURT: That could come under 1109.

"MR. MAINS: So the way I've formatted this particular brief I have all the different theories under which I think we can say something is admissible, yes, that's primarily 1109.

"The other 1109 incident is the 2001 2735 which resulted in a misdemeanor 243E1 conviction. So those would primarily both be 1109. . . .

"THE COURT: Okay.

"That's kind of where I am. I don't see the 10851 being probative. And then as I said I had concerns about the remoteness of the others and at some point it becomes more prejudicial than probative.

"In order to make a meaningful 352 analysis, I am asking for a lot of paper. I need to look at the reports relating to the prior conduct. The 2013, the 2001 conviction, and that one you have the ten year problem, this would come in under 1109."

Following a pause in the proceedings, the session continued:

"MR. MAINS: I think in this case there are additional reasons why it should come in based on the fact it is a different victim that is he has this clear pattern that it is another

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[6] Evidence Code section 1109, subdivision (b) provides: "In an action in which evidence is to be offered under this section, the people shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, in compliance with the provisions of Section 1054.7 of the Penal Code."

273.5 and that occurs when he is on probation for another violent felony just as he is in the current case.

"THE COURT: Was the circumstances the 2001 case relating to the defendant's fear or belief Ms. Sandoval was cheating on him? Is there that factual similarity?

"MR. MAINS: No, not that factual similarity. That wouldn't be 1101B situation. I think they were arguing about finances before.

"THE COURT: This is strictly 1109.

"MR. MAINS: 1109 and 1102, 1103, right and impeachment.

"(Counsel confers with client)

"THE COURT: I will need to look at the police reports on that. My gut is that certainly the 2013 incident would come in. And I'm sort of more hesitant on the 2001 incident. I certainly understand the probative value if the theory of the defense is self-defense that [N.S.] started it and in particular if you're going to have Ms. Sandoval subject to subpoena, and, therefore, subject to cross-examination, I think that helps.

"MR. MAINS: Even if your Honor were to deny in my case in chief, there's the question if I can use it as impeachment.

"THE COURT: Right. If he is testifying, they bring it in in their case in chief 1103B, it might come in under 1103 after they have put on evidence of [N.S.]'s character for violence.

"MR. MAINS: Right.

"THE COURT: Okay."

That was the background against which the testimony began, the reporter's transcript beginning this way:

"THE COURT: Okay, Mr. Mains, do you want to call your first witness.

"MR. MAINS: Yes, if I could just have a minute to review the . . .

"THE COURT: Sure.

"(Pause in the proceedings.)

"MR. MAINS: May we approach for a second?

"(Off record discussion.)

"THE COURT: Okay. Mr. Mains, your first witness.

"MR. MAINS: At this time the people call [N.S.]."

N.S. took the stand, and following a few pages of introduction and background, testified about the Thanksgiving 2010 incident and the February 2013 incident. No objection was made by defendant's counsel, which is certainly understandable, given the background noted above. And the law. There was no error.[7]

Evidence Code Section 1109 Is Not Unconstitutional

Defendant's second argument is that section 1109 violates due process and is thus unconstitutional, an argument to which defendant devotes 15 pages of his brief. Despite its length, the argument is easily rejected, as it has been on numerous other occasions, as defendant's brief acknowledges.

Defendant's argument begins with this acknowledgment: "Section 1109, enacted in 1996, was modeled on the provisions for propensity evidence involving sex offenses in section 1108, enacted the year before. (*People v. Brown* (2000) 77 Cal.App.4th 1324, 1333.) Accordingly, the Supreme Court's holding in *People v. Falsetta* [(1999)] 21 Cal.4th [903,] 917-918, that section 1108 was constitutional against a due process challenge has been applied to section 1109. (*People v. Johnson* (2000) 77 Cal.App.4th 410, 417; *Brown*, [at p.] 1334.)" And defendant goes on to acknowledge, we "may be bound by *Falsetta* (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455)," going on to assert, however, that "the holdings in *Falsetta* and the opinions extending it to domestic violence cases sharply break with state precedent and conflict with federal law."

We disagree, and reach the same conclusion as have the numerous other courts that have addressed this issue.

As our esteemed colleague Justice Simons distills the law in his leading California commentary: "The constitutionality of [section] 1108 has been upheld. [Citations.] The constitutionality of [section] 1109(a)(1) has also been confirmed." (Simons, California

[7] In light of this conclusion, we need not address defendant's claim of ineffective assistance of counsel, nor the People's contention that any error was harmless.

Evidence Manual (2019 ed.) § 6:14, p. 536, citing numerous cases, including *People v. Cabrera* (2007) 152 Cal.App.4th 695, 703; *People v. Johnson*, *supra*, 77 Cal.App.4th at p. 419; *People v. Hoover* (2000) 77 Cal.App.4th 1020; and *People v. Poplar* (1999) 70 Cal.App.4th 1129.)

Our district has agreed. (See *People v. Price* (2004) 120 Cal.App.4th 224, 239–240, and *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1309.) And so has Witkin. As the authors put it, the rationale underlying *Falsetta* "applies to Ev.C. 1109 as well, 'since the two statutes are virtually identical, except that one addresses prior sexual offenses while the other addresses prior domestic violence.' (*People v. Johnson*[, *supra*,] 77 Cal.App.4th [at p.] 417.)" (Witkin, Cal. Evidence (5th ed. 2012) Circumstantial Evidence § 101, p. 505.)

Were the above not enough, we note that defendant's claim about "federal law" is badly overstated: that law does not hold that all propensity evidence is a violation of due process. To the contrary, Federal Rules of Evidence, rule 413 permits evidence of other sexual assaults in criminal cases in which a defendant is accused of sexual assault; and rule 414 permits evidence of other child molestation in cases in which the defendant is accused of child molestation. (Fed. Rules Evid., rules 413 & 414; see generally *Doe v. Busby* (9th Cir. 2011) 661 F.3d 1001; and *Jensen v. Hernandez* (E.D. Cal. 2012) 864 F.Supp.2d 869.)

Giving of CALCRIM No. 852 Was Not Error

Defendant's final argument is that giving CALCRIM instruction 852 was error, because the instruction was argumentative. The argument fails, both procedurally and substantively.

By way of background, on February 10, 2017, the court and counsel discussed jury instructions. Referring specifically to the instruction about which defendant complains, the trial court asked "Any concerns with how I drafted 852?" Defendant's counsel answered "No." Then, two days later, following the close of evidence, the court gave the substantive jury instructions, which, as pertinent here, included this in connection with CALCRIM No. 852:

"The People presented evidence that the defendant committed domestic violence that was not charged in this case, specifically the defendant's commission of felony domestic violence against [N.S.], in February 2013, as well as the defendant's commission of misdemeanor domestic violence against a different woman in August 2001.

"Domestic violence means abuse committed against an adult who's a spouse.

"You may consider this evidence only if the people have proved by preponderance of the evidence that the defendant in fact committed the uncharged domestic violence.

"Proof by preponderance of the evidence is a different burden from proof beyond a reasonable doubt.

"A fact is proved by preponderance of the evidence if you conclude that it is more likely than not the fact is true. If the People have not met this burden of proof, you must disregard this entirely.

"If you decide that the defendant committed the uncharged domestic violence, you may but are not required to conclude from that evidence that the defendant was disposed or inclined to commit domestic violence and based on that decision also conclude that the defendant was likely to commit and did commit domestic violence with prior convictions as charged here in Counts 2, 5, 10 and the lesser crime of battery on a spouse.

"If you conclude that the defendant committed the uncharged domestic violence, that conclusion is only one factor to consider with all the other evidence.

"It is not sufficient by itself to prove that the defendant is guilty of domestic violence with prior convictions as charged here in Counts 2, 5, and 10 or the lesser crime of battery on a spouse. The People must still prove each charge and allegation beyond a reasonable doubt.

"Do not consider this evidence for any other purpose except the limited purpose of judging the defendant's credibility."[8]

[8] The trial court also gave CALCRIM No. 200 which instructed in relevant part, "Do not assume just because I give a particular instruction that I am suggesting anything about the facts. After you have decided what the facts are, follow the instructions that do

As indicated above, defendant not only expressed no concern with the instruction as drafted by the court, he expressly indicated he had none. Thus, his argument could be considered forfeited. (See *People v. Jones* (2013) 57 Cal.4th 899, 969 [" '[a] party may not complain on appeal that an instruction . . . was too general or incomplete unless the party has requested appropriate clarifying or amplifying language' "]; see also *People v. Toro* (1989) 47 Cal.3d 966, 977–978.)

In the face of this record, defendant urges that we nevertheless consider his argument, citing to section 1259, which provides that we can review instructions "if the substantial rights of the defendant were affected thereby." While we doubt section 1259 applies, even considering the argument on the merits demonstrates that is has none—the instruction was not argumentative.

Defendant's argument to the contrary is as follows: "CALCRIM No. 852 expressly referred the jurors to two specific items of the prosecutor's evidence—the 2001 incident involving Christine S. and the 2013 incident in Santa Rosa involving [N.S.] [Citation.] The instruction then told the jurors that they 'consider this evidence,' and they 'may, but are not required to, conclude from [it] that the defendant was disposed or inclined to commit domestic violence and, based on that decision, also conclude that the defendant was likely to commit and did commit the offenses charged' here. [Citation.] It further told the jurors that a conclusion of propensity was 'one factor' among others it may consider in determining Maua's guilt. [Citation.]"

To begin with, defendant's argument overstates the instruction, as it did not tell the jurors to "consider the evidence." To the contrary, it told the jurors—and correctly, we might add—that they "may consider this evidence." That, of course, is the law. (*People v. Cruz* (2016) 2 Cal.App.5th 1178, 1185–1186.) There was nothing "argumentative" about that.

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apply to the facts as you find them." CALCRIM No. 220 instructed that the people had to prove defendant guilty beyond a reasonable doubt and that the jury had to "impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he's entitled to an acquittal and you must find him not guilty."

A leading practice treatise describes an argumentative instruction as one that instead of stating rules of law generally, goes "too elaborately into the facts relied on by one of the parties. Such instructions are improper because they put the court in the position of making an argument to the jury. Moreover, because the instructions emphasize certain facts or theories, the jury may be misled into thinking they are true or extremely important." (Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group, 2017) § 14:100, p. 14–30); see *Fibreboard Paper Products Corp. v. East Bay Union of Machinists* (1964) 227 Cal.App.2d 675, 718.) That description does not apply to the instruction here.

As defendant acknowledges, an earlier version of CALCRIM No. 852 was upheld in *People v. Johnson* (2008) 164 Cal.App.4th 731, 738, which rejected a claim that the instruction was unconstitutional, the court of appeal noting that the California Supreme Court had upheld an instruction that was "similar in all material respects" to CALCRIM No. 852. (*Johnson*, at p. 739, citing *People v. Reliford* (2003) 29 Cal.4th 1007, 1012–1016.)

Defendant also contends that CALCRIM No. 852 deprived him of due process and a fair trial, because it lightened the People's burden to prove every element of the charged offense. This, too, has been rejected before, in *People v. Reyes* (2008) 160 Cal.App.4th 246, holding that CALCRIM No. 852 did not violate due process: "CALCRIM No. 852 makes clear the evidence of uncharged acts of domestic violence may only be considered at all if it has been established by a preponderance of the evidence and explains what is meant by that burden of proof. The instruction also explains that if that burden is not met, the evidence must be disregarded entirely." (*Reyes*, at p. 252.)

DISPOSITION

The judgment of conviction is affirmed.

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Richman, Acting P.J.

We concur:

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Stewart, J.

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Miller, J.

People v Maua (A151286)